EXTRACT FROM OCCASIONAL ADDRESS OF SIR LAURENCE STREET AT THE CONFERRING OF DEGREES FOR THE FACULTY OF LAW, SYDNEY UNIVERSITY, 25 FEBRUARY 1986

I should like to raise for your consideration this evening some developments that have occurred within the machinery of justice over the last four or five years. As lawyers we are all, of course, familiar with Maitland's well founded proposition regarding the importance of the procedures of the law in the development of its substance. It can be said with equal, if not more force, that the machinery of the law bears directly upon this substance. Thus it is important that developments in the structure of our system of justice be known and understood.

The particular development I should like to discuss in outline this evening is the move towards establishing mechanisms for the resolution of disputes outside the formal Court system by processes that involve negotiation or arbitration rather than formal litigation. I take as my text two important pronouncements made in recent years in the United States.

Chief Justice Warren Burger, in his December 1984 report on the judiciary, made specific reference to the value of mechanisms outside the formal Court system. I quote from his report:

> Alternative dispute resolution methods should also be developed and utilised. Another "fruit" from the "tree" of the 1976 Pound Conference is federal court-annexed arbitration. Congress . . . appropriated funds in 1978 for a pilot programme. Two districts have found court-annexed arbitration effective in reducing both the incidence of trial and the time needed to achieve settlement.
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> Congress passed . . . a law to appropriate $500,000 in fiscal year 1985 for additional pilot programmes in federal court-annexed arbitration. Eight federal districts will use this money in closely monitored experiments. This is a programme whose time has come. Experimentation and practical implementation in this area are sorely needed.

Chief Justice Burger then mentioned two other developments in the United States of alternative dispute resolution methods. Again I quote:

> Summary jury trials and mini-trials are becoming increasingly useful as judges across the country adapt these approaches to achieve their goals . . . . The Judicial Conference in 1984 endorsed the experimental use of summary jury trials "as a potentially effective means of promoting the fair and equitable settlement of potentially lengthy civil jury cases."

The Chief Justice noted some successful ventures in the conduct of mini-trials and concluded this portion of his address: "These judicial pioneers should be commended for their innovative programmes. We need more of them to deal with the future."

I shall return to outline and explain in broad terms what we in this State are doing in pursuit of the development of alternative dispute resolution mechanisms—may I call them A.D.R. mechanisms?—but before doing so I should like to quote the second text that I put before you this evening. I do so as it states in plain terms what might be called the new philosophy of creating within the overall machinery of justice both facilities and enthusiasm for the achievement of the settlement of disputes that can be identified as suitable rather for negotiation than for formal court litigation. In the 1982 Cardozo Lecture, Dr Derek Bok, the then President of the Harvard University, emphasised the need to lessen the conflict approach to dispute resolution by recognition of the value of consensus orientated A.D.R. mechanisms. The Harvard President said:

> Foreign businessmen express amazement at a system that relies so heavily on law suits rather than negotiation to settle business differences, a system that exposes the entrepreneur to legal challenge so easily and on so many different fronts, a system that lends itself so readily to harrassment, obstruction and delay . . . no one can dispute that law schools train their students more for conflict than for the gentler arts of reconciliation and accommodation. This emphasis is likely to serve the professional poorly . . . . Over the next generation, I predict that society's greatest opportunities will lie in tapping human inclinations towards collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshalling cooperation and designing mechanisms which allow it to flourish, they will not be at the centre of the most creative social experiments of our time . . . .
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> A serious effort to provide cheaper methods of resolving disputes will require skilled mediators and judges, who are trained to play a much more active part in guiding proceedings towards a fair solution. In short, a just and effective legal system will not merely call for a revised curriculum; it will entail the education of entire new categories of people. It is time that our law schools began to take the lead in helping devise such training.

Those two extracts I have quoted are high minded ideals, but what, I ask rhetorically, is our attitude to them in this country? And what are

we doing about them? Let me briefly address each of these two rhetorical questions.

First, we are coming to recognise the validity of the two separate points made in these two separate quotations. Chief Justice Burger was concerned with the ever-increasing demands being made within an affluent democracy upon the precious resource of its judicial system. A strong, vital and efficient regular judicial structure is without question an essential pre-requisite to the existence of a free democracy. The ultimate availability of formal court adjudication of disputes between citizen and citizen, perhaps more importantly between citizen and State, and in a federation, even more importantly, between State and State or State and Commonwealth, lies at the very heart of our existence as a free nation in this country as well as in other free western nations. But, equally with its importance, it is a precious resource and, as access to our regular court system expands, we must recognise the need to conserve that resource by establishing alternative mechanisms through which the rule of law can, under the watchful eye of the regular court system, be carried throughout the length and breadth of our community. It was this of which Chief Justice Burger spoke, and our need in this country to protect our regular court system from being choked out of availability and relevance is tending to reflect the gravity of the situation facing the judicial system of the United States.

In turning to Harvard President Bok's exhortation to the lawyers to embrace the consensus philosophy, once again our society in this country, no less than in the United States, needs to explore the great advantages of achieving the resolution of disputes through methods of negotiation in preference to the cumbersome and expensive procedures of confrontationalist litigation. We need, as President Bok said, to encourage the development of mechanisms in which this consensus philosophy can be allowed to play a meaningful part.

So much for the first of my two rhetorical questions regarding the relevance in this country of the two lines of thought in the two quotations I have made. I turn to the second question—What is being done in this State in this direction? And here, the scene is one of increasing activity and interest. Time constraints preclude me giving free rein to my enthusiasm to recount what is being done and I must describe them only briefly. There are three A.D.R. mechanisms, two of which are already in place; the third—and probably the most significant—is within a few days of being launched.

The first A.D.R. mechanism was the establishment of Community Justice Centres in January 1981. These Centres operate within a structure provided by the Attorney General's Department. They are designed to deal with disputes such as those between members of a family or neighbours where there is a continuing relationship between the people in conflict. The aim of these Centres is not to make authoritative decisions for the disputing parties, but to help them to research their own mutually acceptable resolution of the dispute through the process of mediation. Mediation services are provided by lay mediators who have completed

a special training course. These mediators are drawn from the community at large and the essential philosophy is that the mediator, as a responsible citizen, attempts through voluntary conciliation with the parties to such essentially local disputes to resolve the conflict.

These Centres are operating with a low profile but with conspicuous success in keeping small disputes out of the regular court system. Costs are minimal as there is no legal representation in the mediations. But, more importantly, a negotiated settlement sends the parties away in an atmosphere at least of peace, if not goodwill, in contrast to the embittering experience that not infrequently follows a court ruling on problems arising between neighbours or others close to one another in society.

I move to the second alternative mechanism—what is compendiously called civil arbitration. This was a scheme introduced by legislation in 1983. Civil disputes brought before the District Court and the Local Court are sifted at an early stage and those considered more appropriate for informal arbitration are referred to be dealt with through this alternative facility of arbitration by a member of a large panel of practising barristers and solicitors who have put forward their names as willing to fulfil the role of arbitrator. They have agreed to act as an arbitrator for a day every few weeks.

In general terms it is the comparatively short uncomplicated case, with a limited amount involved, that is referred for this informal process. The arbitrations have thus far been carried out by barristers or solicitors in their own professional premises. The Act requires them to attempt to achieve a conciliation between the parties and, if this is unsuccessful, then the arbitrator is authorised to act according to equity, good conscience and the substantial merits of the case without regard for technicalities or legal forms. This A.D.R. mechanism does include provision for legal representation and thus is more expensive than the Community Justice Centres. It is, however, dealing with problems of a wider dimension and it has achieved a major level of success. There are about 270 members of the practising profession who have agreed to accept an arbitration once every few weeks and in the last 2½ years over 6,000 cases have been taken out of the court system and disposed of. There has been but minimal resort to the appeal provisions of the legislation indicating a high level of consumer satisfaction with this particular A.D.R. mechanism.

Let me now turn to the third and remaining A.D.R. mechanism. It will be opening its doors within the next few days. It is the product of a committee of judges, practitioners and representatives of the commercial world that has been working to set it up over the last six months. I have had the stimulating role of chairing the committee and the product of its deliberations is the establishment of the Australian Commercial Disputes Centre—an entity which rejoices under what we believe to be the catchy and memorable acronym of A.C.D.C.

In the last few years there has been a significant expansion of commercial activity in Australia. The floating of the dollar and the admitting of foreign banks has brought Australia into more direct

participation in international commerce. There is still outstanding the exciting proposal for the establishment of an off-shore banking facility in Sydney recommended by a committee chaired by Mr. Nicholas Whitlam in early 1984.

An essential facet of the promotion of the free and efficient flow of commerce is a dispute resolving mechanism providing a wide range of options structured to meet specific requirements of varying types of disputes.

On 3 March next the A.C.D.C. will formally open for business on the 21st floor of the Remington Centre. It has been brought into being essentially and primarily with the aim of providing a comprehensive dispute resolution service in the commercial area. It has taken upon itself a wide ranging charter and in this respect it extends into areas not previously provided for.

The critical feature that marks out alternative dispute resolving mechanisms from regular court systems is that the former draw their authority from the agreement of the parties. That agreement may be found in a clause in a contract itself or it may arise after a dispute has crystallised when the parties determine to seek some alternative means of resolving their contest. This concept of consensus pervades the whole field of alternative mechanisms and it is coming increasingly to be recognised as having significant advantages when compared with the confrontationalist, antagonistic philosophy that tends to pervade ordinary court cases.

The Centre is essentially a service concept with the primary function of facilitating the managing and resolution of commercial disputes. This managerial aspect of its role is novel and I should, perhaps, briefly indicate what is contemplated.

Not infrequently in on-going commercial relationships a matter of dispute may arise between the parties. Unless they happen to be able, through their own efforts, to achieve a compromise or resolution, there has not been available to them any structured mechanism short of a full dress court action in order to resolve the dispute. In the situation that I postulate, however, one or other of the parties to the dispute could approach the Centre and seek its intervention. The Centre would then approach the other party offering its services in connection with the dispute. Alternatively, both parties might join in approaching the Centre for its managerial assistance. They might even have provided for this in advance by inserting an appropriate conciliation clause in their contract.

To the forefront amongst the services provided by the Centre would be mediation or conciliation conducted by a person having competence as a mediator and relevant experience which would command the confidence of the parties to the dispute. If the mediation resolves the dispute by arriving at a solution accepted and agreed to by both parties that, no doubt, would be the most desirable outcome possible. Perhaps one of the most significant advantages is that the dispute would have been resolved within a consensus approach thereby preserving unimpaired the goodwill which is so essential to an on-going commercial relationship between the

parties. The conflict approach that inevitably underlies formal court proceedings, can not infrequently at least sour, if not destroy, mutual trust and confidence between the parties to their ultimate detriment and to the detriment of the free flow of trade and commerce.

Apart from the consensus attractions of a successful mediation, there are the dual benefits for the parties of expedition and avoidance of the extensive demands, both financial and of executive time, that are inevitably part of major commercial litigation in the courts.

This, then, is one of the significant services available to parties who elect to avail themselves of this managerial assistance available at the Centre. If the mediation fails then, apart from whatever time and cost may have been involved in it, neither party would be in the least way inhibited in the exercise of a free choice to pursue the resolution of the dispute through other channels. In a genuine commercial dispute, however, it seems unlikely that preliminary mediation would fail completely. Even if not successful it would be likely to narrow the points of outstanding dispute between the parties. On total or partial failure of the mediation, the Centre would then be in a position to offer the parties, if they chose to accept it, resolution of the issues by arbitration conducted in accordance with rules of the parties' own choosing, either Uncitral or others.

The commercial world has demonstrated in commercial centres in other countries the demand for arbitration mechanisms. The Centre would accordingly have available panels of skilled and appropriately experienced arbitrators to undertake the resolution of their dispute. This, of course, would lead to a binding award. The commercial advantages of arbitration in point of expedition, containment of antagonism and economy of legal costs and executive time are well recognised and need no development.

Consideration is being given to conferring on the Supreme Court jurisdiction to make orders in aid of mediations and arbitrations being managed by the Centre. Such orders might include orders for sale of deteriorating goods with complete protection to all concerned where questions of ownership may, at the outset, be far from clear; or they might be orders for the production of documents by strangers such as bankers. A variety of other orders in aid could be available to serve the particular requirements of the mediation or arbitration in hand. In this context it would be contemplated that the Court's role would be specifically directed towards assisting a current mediation or arbitration towards a successful conclusion.

I shall not stay to outline the structure through which this Centre will operate. Essentially, it will be controlled by a Management Committee with representatives chosen from the various entities who can be expected to use its services. It will be administered by a Secretary General who will be a top level executive. It is expected, moreover, to play a wider role than the mere mediation and arbitration of commercial disputes. It will have an educative responsibility and in this context I am glad to be able to acknowledge the encouragement the Centre has received from the Vice-Chancellor and from the Dean of the Faculty of Law, Professor Phegan.

It will play a role in servicing commercial dealings that may create problems which cannot be fairly described as having progressed to the stage of disputes. Questions of appraisal or valuation where a competent and independent opinion may be required on the basis that both parties in advance will bind themselves to accept it present a field within which the Centre could offer facilities. Even in a more modified area, a party to a commercial dispute or litigation may require the forensic assistance and guidance of, say, a civil engineer, a biochemist, a handwriting expert or laboratory services, and might find the assistance that is needed through the agency of the Centre.

I fear, Mr. Chancellor, that I may rather have let my enthusiasm run away with me in the matter of time. I am anxious, however, to transmit some of this enthusiasm to the new lawyers of today whose graduation we witness and celebrate this evening. It rests upon you, ladies and gentlemen, particularly those who embark on the practice of the law, to take up the challenges issued by Chief Justice Burger and Harvard President Bok. I suppose that in today's jargon, what I urge you to do is to think laterally about our mechanisms of dispute resolution. But, in so doing, and in using and helping to mould these alternative mechanisms, do not for one moment lose sight of what I have described earlier as the overall and indispensable responsibility and authority of the regular court system as the ultimate guardian of the rule of law and of our great privileges of freedom and justice. These A.D.R. mechanisms will serve our society within their respective fields. But their role is not to displace the essential responsibility of our regular court system—rather it is to serve under and in conjunction with that system in the preservation of our constitutional inheritance of a free democracy governed by the dictates of law and of justice. The essential purpose of these A.D.R. mechanisms is to conserve that precious and indispensable resource—our judicial system upon which we and our nation are so essentially dependent.

Mr. Chancellor, I thank you for the invitation to deliver this occasional address and it is timely that I now bring it to an end. I have in mind in particular in so doing that in some circles of our society with whom I come into comparatively regular contact, the most popular judges are those whose sentences are the shortest. In concluding on that note I should, of course, disclaim any suggestion that the circles who look for short sentences have any analogy to this evening's learned assemblage.